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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

314-6

No. 712

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

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No. .....

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on August 30, 1941, affirming the judgment of conviction of the United States District Court for the Eastern Division of the Eastern Judicial District at the City of St. Louis and State of Missouri, convicting the petitioners of violation of 48 Stat. 979, Title 18, U. S. C. A., Section 420a, "Anti-Racketeering Act."

SUMMARY.

This is a criminal case commenced in the United States District Court for the Eastern District of Missouri by an indictment (R. 14-60) returned by grand jury on the 11th day of June, 1940 (R. 14).

The indictment is in twelve counts and charges petitioners jointly in the first eleven counts with violating 48 Stat. 979, Title 18, U. S. C. A., Section 420a, "Anti-Racketeering Act"; the twelfth count charges violation of 26 Stat. 209, Title 15, U. S. C. A., Section 1, "Sherman Anti-Trust Act."

The jury returned verdict finding defendants guilty as charged in counts 1 to 11 and not guilty as charged in count 12. The respective sentences were five years imprisonment upon each count, to run concurrently, and a fine of ten thousand dollars upon the first count.

The petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit on September 24, 1940 (R. 1), which Court, on the 30th day of August, 1941, affirmed the judgments and sentence of the District Court (R. 937). (Opinion not yet reported, but printed at R. 915-938.) Petition for rehearing was overruled on October 1, 1941 (R. 957) and the Court stayed issuance of mandate October 6, 1941 (R. 961).

STATUTE INVOLVED.

The Act of June 18, 1934, c. 569, 48 Stat. 979, 18 U. S. C., Sec. 420 (a) *et seq.*, provides in part as follows:

> Sec. 2 (420a). Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 3 (a) (420b). As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

* * * * * * *

Sec. 6 (420d). Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: Provided, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT.

The indictment alleges three separate transactions.

(a) **First transaction.**[1]

The petitioners were members of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter referred to as IATSE, and had been for more than thirty years. In 1935 internal strife broke out in Local Union No. 143 and the national officers of the organization placed petitioner Nick, who was then International First Vice-President, in complete charge of Local Union No. 143. The affairs of Local Union No. 143 were taken up at the thirty-third annual convention of the IATSE and the national convention ratified, by resolution (Def. Ex. 38, R. 661-3; admitted at R. 656), the act of the national officers in placing petitioner Nick in charge of Local Union No. 143 and ordered petitioner Nick to maintain strict domination over Local No. 143; suspended the local constitution and by-laws of the local union; empowered him to take full charge, conduct the affairs and to demand and accept the resignations of the officers of Local No. 143. In accordance with this mandate of the national convention, Nick assumed full charge of the union affairs, ironed out many difficulties (R. 159), completely unionized all theatres in St. Louis and St. Louis County (R. 160), increased wages of operators, secured the passage of city ordinances mak-

1 The first count (R. 14-24) alleges a conspiracy, under subsection (a) of the act, to directly and substantially interfere with the distribution of films in interstate commerce by making high wage demands for moving picture operators and threatening to strike unless demands were met by employer, then lowering demand when paid money for personal use. (Note: The money paid agent belongs to principal.) Count 2 charges (R. 24-29) the same conspiracy under subsection (b) of the act. Count 3 (R. 29-32) charges substantive offense of obtaining money, under subsection (a) of the act. Count 4 (R. 33-36) charges substantive offense of attempting to obtain money under subsection (a) of the act. Count 5 (R. 36-40) charges substantive offense under subsection (b) of the act of obtaining the same money as charged in count 3.

ing movie booths safe against fire, and sanitary, and requiring two operators per booth (R. 160).

The Government's evidence (R. 107-128) showed that films are manufactured in states outside Missouri, shipped to film exchanges in Missouri and distributed by these film exchanges to various theatres; that if the theatres were closed for any reason the number of films coming into St. Louis would be curtailed. The film exchange executives testified that the petitioners did not interfere with the shipment of films (R. 112, 123, 127), and two of these stated that they did not know the petitioners and had had no dealings with them. **These witnesses proved that petitioners did not interfere with the distribution of a single film.**

The 1936 wage contract between the exhibitors and operators expiring August 31, 1937, the exhibitors and petitioners signed, on September 1, 1937, a contract or truce (R. 299, Gov't Ex. 11a, p. 6; offered by Gov't and admitted R. 306-307), wherein Local Union No. 143 agreed **not to strike** or abandon the theatres pending negotiations for the 1937 wage contract and the exhibitors agreed, in this truce, to appoint a committee to negotiate with the union representatives and to ratify the committee's action. The agreement provided that wages would be adjusted as of September 1, 1937, regardless of the time when contract might be signed.

The first five counts of the indictment cover these negotiations for the 1937 wage contract. The committee and the petitioners met on September 8, 1937. The committee proposed a reduction of wages of from 10 per cent to 15 per cent (R. 253-318); the petitioners offered a counter-proposal calling for a reclassification of theatres on a seating capacity basis (Gov't Ex. 9, R. 248-250; admitted R. 571). The membership was informed of the progress of the

negotiations, notwithstanding that petitioner Nick was in full charge by virtue of the mandate of the national convention (Def. Exs. 8, 9, R. 669-670); admitted R. 667); meetings between the exhibitors and the petitioners continued, but no progress was made. Both sides were adamant. No actual threats of strike were made at any of these meetings (R. 331-363); no demands for money were made by the petitioners (R. 269).

Witness Wehrenberg, over objection, was permitted to testify concerning a conversation held between the members of the committee out of the presence of the petitioners (R. 261-263). Member Kaimann said, "It looks like there's going to be another picnic" (R. 263), and Mr. Thimmig said, "It looks very much like it." Kaimann testified, over objection (R. 345), that because petitioners were still insisting on reclassification of theatres for wage rates the committee was commencing to get worn out; that on the way downstairs he casually said to one of the committee members, "It looks like they want another picnic." Then the witness (R. 347) was permitted to relate a conversation he held with news reporters in 1936 that "picnic" was a term used to mean "pay-off." The petitioners moved for a mistrial (R. 347). Witness Pappas testified (R. 359) that at one of the meetings Mr. Thimmig said, "Well, I will go back and see if I can **do something** to regulate all matters with them."

Thimmig testified that he held several meetings with petitioner Weston and finally agreed to pay "him" $7,500 (R. 326). Thimmig and Kaimann set about raising money from the theatre owners and thereafter, on November 24th, the committee delivered sixty-five hundred dollars to Mr. Weston, at which time Weston delivered a signed contract for the 1937 wages (Gov't Ex. 11, R. 279-287; admitted R. 306). The contract provided for a small increase in wages

and reduced free warm-up time (R. 320). Local No. 143 approved the contract (Def. Ex. 10, R. 673; admitted R. 667). All members of the committee testified that no demand for money was made to the whole committee nor was any threat to strike communicated to the committee.

Komm, a member of the committee (R. 363), was asked:

"Q. They never said they wanted a pay-off?
A. They never said at any time that they expected anything from the committee.
Q. Did you have any feeling of fear or apprehension?
A. No, sir; I didn't."

Witness Wehrenberg testified (R. 316):

"Q. Now, you testified that Mr. Weston told you that there was to be a strike on theatres, that unless you signed a contract, is that right?
A. No, he didn't say there was going to be a strike.
Q. What did he say?
A. He said there would be no operators on theatres today."

Harry C. Arthur, for the first-run houses (Fanchon and Marco), testified that an agreement was reached with the petitioners without any increase in wages; that no payment was demanded by the petitioners nor was any made, and (R. 400) that no threat to strike was made other than the implication of a strike is implied in a demand for higher wages.

"Every time you have negotiations a strike is always implied. If you don't get together with them on negotiation, you are always looking towards a strike. I never had wage negotiations in my life that I didn't anticipate that if we didn't get together the men would walk out."

(b) **Second transaction.**[1]

The evidence concerning counts 6 to 10 begins at R. 414 and shows that petitioner Weston, in September, 1936, organized and incorporated the Co-operative Sound Service Supply Company, a Missouri corporation, for the purpose of servicing sound equipment in theatres. The members of the union were notified by letter (Gov't Ex. 16, R. 423; admitted R. 571) on September 12, 1936, that article I, section 3, of the international by-laws of the union forbade nonunion members to service theatre sound equipment and warned the operators not to violate the rule. At that time theatres in St. Louis were being serviced by RCA and Electrical Research Products, Inc., national organizations. On October 12, 1936, the membership was notified that the Co-operative Sound Service Supply Company had signed an agreement with the local to employ only members of the union in accordance with the rules of the IATSE (Gov't Ex. 17, R. 429; admitted R. 571). The Co-operative Sound Service Supply Company employed Jesse Cook, the only union sound service engineer in St. Louis. The national organization was negotiating with RCA and ERPI, which negotiations were concluded about December 13, 1937. Their operators then became members of the union and were permitted thereafter to service sound equipment in the theatres. Petitioner Weston was appointed business manager of Local No. 143 in January, 1937. He sold his shares of the stock to Thomas J. Canavan, who became president and manager of Co-op. Canavan testified (R. 552) Co-op.'s charges were only $5.50 per week,

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1 Count 6 (R. 40-43) alleges a conspiracy under clause (a) to directly and substantially interfere with the distribution of films in interstate commerce by forming a corporation to service sound equipment in theatres, petitioners using their position in the union to cause theatre owners to take the company's service and shared in profits of company. Count 7 (R. 43-46) alleges same conspiracy under clause (b). Count 8 charges substantive offense of obtaining money under clause (a). Count 9 (R. 46-48) charges attempt to obtain same money under clause (a), and count 10 (R. 48-51) charges obtaining same money under clause (b).

while RCA and ERPI charged an average of $15.00 per week; that Co-op. rendered better service than its competitors; that he gave part of his salary to petitioners. Interstate commerce was not involved and petitioners received no money from theatre owners.

(c) **Third transaction.**

The eleventh count is covered by the testimony of Harry C. Arthur, Jr. (R. 383-4). The Orpheum Theatre in St. Louis was closed. Fanchon & Marco wished to reopen it as a second-run house rather than a first-run house and thereby use lower paid operators. Arthur loaned petitioner Weston $2,000. No threats were made and interstate commerce was not involved.

JURISDICTION.

The judisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (United States Code, Title 28, Section 347).

THE QUESTIONS PRESENTED.

1. Is the indictment sufficient?

(a) Does the Anti-Racketeering Act exempt Labor and its representatives from prosecution under the act for incidents growing out of negotiations for wage contracts by virtue of section 420 (a) and proviso of 420d (Sec. 6)?

(b) Does a threat to strike by a labor union constitute interference with interstate commerce?

(c) Is the operation of moving picture projecting machine interstate commerce under the act?

(d) Is negotiation for wage rates for moving picture operators interstate commerce?

(e) Does the Anti-Racketeering Act limit or nullify the National Labor Relations Act?

(f) Were the three distinct transactions properly joined in one indictment?

2. Is the Anti-Racketeering Act constitutional under the First, Fifth and Tenth Amendments and art. 4, sec. 4?

3. Is hearsay admissible in evidence? And may witnesses relate third-party conversations held outside the presence of the accused?

4. Is there any competent proof to support the verdict: (a) as to interstate commerce; (b) as to threats of force and violence; (c) as to conspiracy?

5. Did the Court err in refusing to give petitioners' requested instructions?

6. Did the trial court properly declare the law: (a) as to what constitutes interstate commerce where a labor union is involved; (b) as to what stoppage affects such commerce; (c) as to what constitutes actionable threat by a labor union; (d) as to circumstantial evidence; (e) as to "unless * * * proven guilty beyond a reasonable doubt, conviction must result"; (f) as to two purposes; (g) as to Allen instruction?

7. Is the verdict of "guilty" on the first eleven counts consistent with the verdict of "not guilty" on the twelfth count, when interference with or restraint of interstate commerce is a necessary and essential particular of each of the counts?

REASONS FOR GRANTING APPLICATION FOR WRIT.

I.

The decision of the Circuit Court of Appeals as to the construction of section 420d (the proviso exempting Labor from the operation of the act) by holding that the petitioners, as labor leaders, can be punished under the act for threatening to call a strike in connection with wage scale negotiations, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of United States v. Local 807, 118 F. (2nd) 684 (certiorari granted October 13, 1941).[1] In the Local 807 case, delegates and members of the union, by concerted action and in some instances with actual violence, stopped interstate trucks and demanded and received money from them. The Second Circuit held (l. c. 686):

> "For the foregoing reasons, we do not believe that the act made it a crime for labor union to get jobs or an increase in wages for its members, even by threats of violence."

The majority opinion further held (l. c. 688):

> "Furthermore, the proviso to section 420d, although that, too, is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere."

Circuit Judge Clark, in concurring in the majority opinion, said, p. 689:

> "I agree that it is 'most obscure' and also that it 'at least shows a vague intention to discriminate be-

[1] Since the Court has granted certiorari in U. S. v. Local 807, it would seem that it should be granted here, also, in order to resolve the conflict, as well as for the reasons set forth at page 10, No. 131, the petition of U. S. for writ in U. S. v. Local 807.

tween violence in labor disputes and elsewhere.' It may therefore mean, in effect, that the acts of violence here made a federal crime do not include such acts when occurring in otherwise legitimate activities of bona fide (i. e., non-outlaw) labor organizations. If the word 'otherwise' should be omitted from this statement, if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the act. * * * Perhaps final interpretation should not now be attempted, but as at present advised, I think conviction cannot be had where the acts or threats complained of are part of an endeavor of members of a bona fide labor organization to carry out their otherwise legitimate objects."

II.

The decision of the Circuit Court of Appeals as applied to labor unions is contrary to the labor policy of the United States as expressed in the Norris-La Guardia Act, the Wagner Act, the Clayton Act, and the exceptions contained in the Anti-Racketeering Act, and if adhered to will destroy organized labor, making every effort by Labor to secure higher wages a crime against the laws of the United State; therefore, there is urgent need for an authoritative decision by this Court on a question of public importance and federal law, which has not been, but should be, settled by this Court.

III.

The Circuit Court of Appeals' decision is in conflict with this Court's decision in Thornhill v. State of Alabama, 310 U. S. 88, in that it denies employees the right to communicate wage demands to employers and thereby denies them freedom of speech guaranteed by the First Amendment.

IV.

The opinion of the Circuit Court holding that the threat to strike by a labor union constitutes an act of interference with interstate commerce is in conflict with the applicable decisions of the Supreme Court in the cases of Apex Hosiery Company v. Leader, 310 U. S. 469, and United States v. Hutcheson, 312 U. S. 219.

V.

The Circuit Court held that hearsay evidence and third-party conversations, held out of the presence of the defendants, are admissible in evidence and thus so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Wherefore, your petitioners respectfully pray that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

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Dated St. Louis, Missouri, October ...., 1941.